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June 25, 2003

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## **Via Courier and Electronic Filing**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
c/o Vistrionix, Inc.  
236 Massachusetts Avenue, N.E.  
Suite 110  
Washington, DC 20002

## ***Ex Parte Presentation***

Re: SAT-STA-20030611-00114; DIRECTV, Inc.; Request for Special  
Temporary Authority to Move the DIRECTV 6 and DIRECTV 1 Direct  
Broadcast Satellites, June 11, 2003;  
and  
Petition for Administrative Sanctions of the State of Hawaii (MB Docket No. 03-  
82, IB Docket No. 98-21).

Dear Ms. Dortch:

On behalf of our client, the National Rural Telecommunications Cooperative, (NRTC), please be advised that Steven T. Berman, Senior Vice President, Business Affairs and General Counsel of NRTC, and the undersigned met yesterday with Tom Tycz, Jennifer Gilsenan, Selina Khan and Evan Kerrane of the FCC's International Bureau and Rosalee Chiara and Eloise Gore of the Media Bureau to discuss the above-captioned request for Special Temporary Authority (STA) and the related Petition for Administrative Sanctions filed by the State of Hawaii (Hawaii). James H. Barker of Latham & Watkins attended the meeting on behalf of DIRECTV, Inc. (DIRECTV).

NRTC's purpose during the meeting was to make clear the background and context of the STA and to explain how DIRECTV has been "gaming" the Commission for more than 3 years by manipulating its satellites and service offerings to Hawaii in furtherance of its private litigation agenda against NRTC. We explained that since 1999, DIRECTV has been fully capable of providing core programming to Hawaii via DIRECTV 1R, yet for purposes of advancing its litigation against NRTC has chosen not to do so -- without seeking a waiver from the Commission of the Geographic Service requirements (47 CFR § 25.148(c)).

Ms. Marlene H. Dortch  
June 25, 2003  
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During the meeting, we discussed NRTC's letter to the Commission dated June 17, 2003, which clarified certain facts regarding the STA. A copy of that letter is attached. It is requested that the letter be incorporated into the record of the separate proceeding entitled Petition for Administrative Sanctions of the State of Hawaii (MB Docket No. 03-82, IB Docket No. 98-21), since it bears on the same issues.

We also distributed copies of and discussed the attached Power Point slides. Based on DIRECTV's own submissions, we pointed out that DIRECTV has not been candid in its dealings with the Commission regarding its lack of service to Hawaii. For more than three years, DIRECTV ignored claims that it was limiting service to Hawaii as part of its litigation strategy against NRTC and insisted instead that undefined technical problems prevented it from providing core programming to Hawaii.

We distributed copies of and discussed excerpts (pp. 12-15) from DIRECTV's Opposition to Hawaii's Petition (Opposition), dated April 24, 2003 (attached). The Opposition finally explains -- in DIRECTV's own words -- that its decision not to use DIRECTV 1R to serve Hawaii with core programming has been based on its private litigation agenda against NRTC.

After more than three years of denying core programming to Hawaii, DIRECTV now argues that the "primary purpose" of its STA is to "enhance promptly" its provision of service to Hawaii (STA, p.1). We believe this statement lacks candor, because the primary purpose of the STA is to advance DIRECTV's litigation position against NRTC, not to serve Hawaii. It is impossible to accept DIRECTV's newly found interest in promptly improving service to Hawaii through the relocation of DIRECTV 1 and DIRECTV 6, since DIRECTV 1R has been fully capable of serving Hawaii with core programming since its launch in 1999.

We noted that NRTC did not formally oppose DIRECTV's STA, since the Commission grants wide latitude to DBS licensees in using STAs to manage their fleets, but we urged the Commission to review the STA in the context of NRTC's comments and Hawaii's pending Petition for Administrative Sanctions. Any Commission action in response to the STA should be without prejudice to appropriate enforcement proceedings against DIRECTV for its continuing failure to comply with the Geographic Service rules and its lack of candor in connection therewith.

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Your attention to this matter is appreciated. Should you have any questions or require any additional information, please feel free to contact the undersigned.

Sincerely,

/s/ Jack Richards

Jack Richards

Attachments:

- Letter from NRTC to Jennifer Gilsenan, Chief, Satellite Policy Branch, dated June 17, 2003, regarding DIRECTV's Request for STA.
- NRTC's Power Point Presentation: DIRECTV's Request for STA and Hawaii's Petition for Sanctions.
- Excerpts from Opposition of DIRECTV to Hawaii Petition for Administrative Sanctions.
- Certificate of Service

June 17, 2003

**Jack Richards**  
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**VIA Hand and Electronic Delivery**

Ms. Jennifer Gilsenan  
Chief, Satellite Policy Branch  
Satellite Division  
Federal Communications Commission  
445 12th Street S.W.  
Washington, D.C. 20554

Re: DIRECTV, Inc.; Request for Special Temporary Authority to Move the  
DIRECTV 6 and DIRECTV 1 Direct Broadcast Satellites

Dear Ms. Gilsenan:

On behalf of our client, the National Rural Telecommunications Cooperative (NRTC), this is to clarify certain facts relevant to the Commission's consideration of the request by DIRECTV, Inc. (DIRECTV), dated June 11, 2003, for Special Temporary Authority (STA) to move its DIRECTV 6 and DIRECTV 1 Direct Broadcast Service (DBS) satellites.

DIRECTV states that "the primary purpose of the requested STA is to enhance promptly DIRECTV's DBS service to Hawaii"<sup>1</sup> NRTC believes, however, that the primary purpose is to advance DIRECTV's litigation agenda against NRTC. DIRECTV could promptly enhance DBS service to Hawaii without the delay and uncertainty involved in launching a new satellite (DIRECTV 7-S) and relocating two others, by transmitting so-called core programming services (including A&E, Cartoon Network, Country Music Television, Discovery, Disney, Encore Basic, ESPN, Family Channel, Headline News, The Nashville Network, TNT, Turner Classic Movies, USA, Weather Channel, WTBS and others on the list of 22 specific programming services provided to NRTC by DIRECTV) from DIRECTV's existing satellite at 101° WL: DIRECTV 1R.

Rather than "promptly" providing a full package of programming to Hawaii, it appears that DIRECTV has chosen to embark on a prolonged and elaborate "shell game," by delaying, obfuscating and misrepresenting its intentions to the Commission for more than three years...all for the purpose of advancing its litigation strategy in a private contract dispute with NRTC.

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<sup>1</sup> STA, p.1

### Background

NRTC is a not-for-profit cooperative comprised of 705 rural electric cooperatives, 128 rural telephone cooperatives and 189 independent rural telephone companies located throughout 46 states. Since its creation in 1986, NRTC's mission has been to provide advanced telecommunications technologies and services to rural America. NRTC's goal is to ensure that rural Americans receive the same benefits of the modern information age as their urban counterparts.

On April 10, 1992, NRTC entered into a DBS Distribution Agreement, as amended (the DBS Agreement), with Hughes Communications Galaxy, Inc., the predecessor in interest to DIRECTV, to support the development and launch of the first high-powered DBS service in the United States. NRTC, its members and affiliates invested more than \$100 million to capitalize DIRECTV's satellite business. In return, NRTC received among other things the right to distribute DIRECTV services to subscribers located in certain areas of the country. NRTC, its members and affiliates currently provide DIRECTV programming to more than 1.6 million households.

On June 3, 1999, NRTC filed a lawsuit against DIRECTV in the United States District Court for the Central District of California.<sup>2</sup> In initiating the litigation, NRTC alleged that DIRECTV improperly refused to allow NRTC to distribute certain premium programming as required by the DBS Agreement. In response, DIRECTV raised other issues in counterclaims. One of these issues is the duration of the DBS Agreement, which is tied to the life of the satellite(s) at the 101° WL location. It is in furtherance of this claim that DIRECTV is proposing to relocate DIRECTV 1 back to 101° WL.

### DIRECTV's Longstanding Failure To Comply With Geographic Service Rules

In the mid-1990's, the Commission was engaged in a lengthy "Geographic Service Proceeding" to ensure that DIRECTV and other DBS licensees provided programming service to Hawaii that was comparable to the programming provided to consumers in the continental United States (CONUS).<sup>3</sup> Despite initially supporting the Commission's efforts,<sup>4</sup> DIRECTV

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<sup>2</sup> NRTC v. DIRECTV and related actions, CV 99-5666-LGB (CWx) (June 3, 1999, C.D. CA).

<sup>3</sup> Report And Order, *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712, IB Docket No. 95-168, PP Docket No. 93-253 (released December 15, 1995) (*DBS Rules Proceeding*); Report And Order, *In the Matter of Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd. 11331, IB Docket No. 98-21 (released June 13, 2002) (*2002 DBS Rules Proceeding*).

<sup>4</sup> See Comments of DIRECTV, Inc., *DBS Rules Proceeding*, pp. 25-26, dated November 20, 1995.

backed-off once Hawaii pressed its complaints at the Commission regarding DIRECTV's inadequate service offerings.

EchoStar Communications, Inc., the only other DBS licensee providing CONUS service, fully met the requirements of the Commission's Geographic Service Rules.<sup>5</sup> DIRECTV, however, continued to insist that technical issues prevented it from providing comparable service to Hawaii.<sup>6</sup> In an ex parte filing several years ago, however, DIRECTV put forth a different explanation.

Rather than citing technical issues as a justification for not adequately serving Hawaii, DIRECTV candidly admitted on June 30, 2000, that certain "litigation issues" stemming from its dispute with NRTC, "limit[ed]" its program offerings to Hawaii. Providing no details or explanation, DIRECTV simply stated that since its dispute with NRTC involved "satellite and programming rights," its program offerings to Hawaii were restricted due to an undefined "NRTC limitation."<sup>7</sup>

NRTC responded to DIRECTV's ex parte claims on September 7, 2000.<sup>8</sup> NRTC pointed out that there is no "NRTC limitation" in the DBS Agreement that prevents DIRECTV from providing a full array of popular programming to Hawaii. NRTC noted that DIRECTV's ex parte submission was an admission that core programming services (Discovery, Disney, Encore Basic, ESPN, Headline News, USA, The Weather Channel, etc.) *could* be provided to Hawaii, but that DIRECTV *chose* not to do so. NRTC argued that DIRECTV's decision to deprive Hawaii of these core programming services was a "calculated litigation strategy" against NRTC.<sup>9</sup>

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<sup>5</sup> 47 C.F.R. § 25.148(c).

<sup>6</sup> See e.g., Ex Parte Notice of DIRECTV, Inc., *DIRECTV-5 Application Proceeding*, p. 4, dated September 20, 2000 (containing a September 14, 2000 press release in which DIRECTV announced a "specially designed" programming package for Hawaii. The only reasons cited in the press release for the dearth of core programming (e.g. TBS, CNN, ESPN, C-Span) were the "limits in signal coverage from [the 101° W.L.] orbital location."); see also Ex Parte Notice of DIRECTV, Inc., *DIRECTV-5 Application Proceeding*, pp. 3-4, dated August 3, 2000 (arguing that the only reasons core programming could not be shifted to DIRECTV-1R were the: 1) "massive expense" for new hardware and receiving equipment; and 2) requirement to rely on the damaged TEMPO 1 satellite to provide service to consumers. There is no mention made regarding the impact of the litigation.); see also, Reply Comments of DIRECTV, Inc., *2002 DBS Rules Proceeding*, pp. 6-7, dated April 21, 1998 (arguing that the Commission's geographic service rules must "not mandate the impossible" and that "any requirement effecting the eastern orbital slots must account for technical limitations at each location.").

<sup>7</sup> Ex Parte Notice of DIRECTV, Inc., *DIRECTV-5 Application Proceeding*, dated June 30, 2000 (*DIRECTV Ex Parte*).

<sup>8</sup> *NRTC Hawaii Comments*.

<sup>9</sup> *NRTC Hawaii Comments*, p. 9.

Hawaii likewise questioned DIRECTV's motives regarding the NRTC litigation and requested further information and clarification from DIRECTV.<sup>10</sup> Yet despite NRTC's allegations and Hawaii's repeated requests, DIRECTV provided no clarification of the statements in its earlier ex parte submission and instead remained silent on the issue for almost three years.

During this entire period, DIRECTV refused to admit how its litigation posturing against NRTC affected its service offerings to Hawaii. DIRECTV failed to respond in any substantive manner to the comments of either NRTC or Hawaii regarding the litigation.<sup>11</sup> Instead, DIRECTV continued to insist that technical obstacles prevented it from offering expanded programming services to Hawaii.<sup>12</sup> DIRECTV attempted to shove under the rug its "slip of the tongue" during its earlier ex parte presentation -- when it candidly admitted the *real* reason why full service was not being provided to Hawaii.

Almost three years later, Hawaii filed a *Petition for Administrative Sanctions* with the Commission, seeking sanctions against DIRECTV for its continuing failure to provide comparable programming services to Hawaii.<sup>13</sup> Apparently in light of the threat of administrative sanctions, DIRECTV finally was forced to follow-up on its earlier ex parte presentation and admit its true motives in providing second-class service to Hawaii.

DIRECTV admitted that its failure to serve Hawaii with a full complement of programming was due to its litigation position against NRTC.<sup>14</sup> DIRECTV stated that it retains its core programming services on DIRECTV-2 (which does not serve Hawaii) and refuses to move them to DIRECTV 1-R (which does serve Hawaii), because a transfer of core programming from DIRECTV-2 to DIRECTV 1-R would make clearer that DIRECTV 1-R and not DIRECTV 1 measures the term of the DBS Agreement between NRTC and DIRECTV.

As a result of DIRECTV's litigation maneuvering, consumers in Hawaii do not receive any of the core programming, which DIRECTV continues to transmit from DIRECTV 2. Instead, they receive only non-core programming from DIRECTV 1-R. According to

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<sup>10</sup> Reply of the State of Hawaii, *DIRECTV-5 Application Proceeding*, dated July 24, 2000, p. 4, n. 7 (*Hawaii Reply Comments*)

<sup>11</sup> See e.g., Ex Parte Notice of DIRECTV, Inc., *DIRECTV-5 Application Proceeding*, p. 2, dated September 20, 2000 (arguing that DIRECTV saw "no need to comment further" on the litigation.). In addition, despite repeated promises to provide further information regarding the litigation's alleged impact, DIRECTV failed to provide the information. *Hawaii Reply Comments*, n. 7.

<sup>12</sup> See n. 7 *supra*.

<sup>13</sup> *Petition for Administrative Sanctions of the State of Hawaii*, MB Docket No. 03-82, February 6, 2003 (*Petition for Administrative Sanctions*).

<sup>14</sup> See *Opposition of DIRECTV*, MB Docket No. 03-82, April 23, 2003 (*Opposition*).

DIRECTV, providing core programming to Hawaii via DIRECTV 1-R would "have a severe economic impact" on DIRECTV due to the dire litigation consequences.<sup>15</sup> This alleged "severe economic impact" means only that the initial term of DIRECTV's contractual arrangement with NRTC might last longer than DIRECTV wants it to last.

It is longstanding Commission policy to refuse to adjudicate private contracts for which an appropriate forum exists in the courts.<sup>16</sup> There is no reason for the Commission to deviate from that policy by becoming directly involved in NRTC's dispute with DIRECTV, and NRTC is not asking for the Commission's involvement here. NRTC seeks only to point out to the Commission the relevant facts.

DIRECTV is proposing to shuffle two of its satellites and to launch a third, under the guise that the "primary purpose ... is to enhance promptly DIRECTV's DBS service to Hawaii."<sup>17</sup> That statement is untrue. If DIRECTV were truly interested in promptly providing enhanced DBS service to Hawaii, it could easily make core programming available -- virtually instantaneously -- by using DIRECTV 1-R, which is already deployed at the 101° WL location.

#### DIRECTV's Previous Relocation of DIRECTV 1

A further example of the disingenuous nature of DIRECTV's actions can be found by comparing its 1999 minor modification application -- not an STA -- to move DIRECTV 1 to 110° WL,<sup>18</sup> with its current STA. In 1999, DIRECTV proposed a "four step" process for moving DIRECTV 1 to its current 110° WL location: 1) grant of its transfer of control application for the three channels at 110° WL from USSB to DIRECTV; 2) grant of DIRECTV's launch and operating authority application for DIRECTV 1-R; 3) grant of an STA to test and place in final position DIRECTV 1-R; and 4) grant of the Minor Modification Application to move DIRECTV 1 from 101° WL to 110° WL.<sup>19</sup> Only after all four steps were completed would DIRECTV "drift

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<sup>15</sup> *Opposition*, p. 13.

<sup>16</sup> Memorandum Opinion And Order, *In the Matter of Martin W. Hoffman, Trustee-in-Bankruptcy, for Astroline Communications Company Limited Partnership*, 15 FCC Rcd 22086, (released November 8, 2000) (concluding that a private contractual dispute between the parties was best resolved in a local court with appropriate jurisdiction); *Listeners' Guild, Inc. v. FCC*, 813 F.2d 465 (DC Cir, 1987) (noting longstanding Commission policy of refusing to adjudicate private contract law questions for which a forum exists in state court); *Texarkana TV Cable Co. v. Southwestern Electric Power Co.*, 49 RR 2d 1043 (Common Car. Bur., 1981) (concluding that the Commission is not empowered to adjudicate the extent of a party's contractual obligations or to determine the legal impact of a party's failure to fulfill its contractual obligations).

<sup>17</sup> STA, p.1.

<sup>18</sup> Application for Minor Modification, SAT-MOD-19990603-00062 (filed June 3, 1999) (*DIRECTV-1 1999 Modification*).

<sup>19</sup> *Id.*, pp. 3-4.



[DIRECTV 1] to 110 WL and . . . initiate service from that orbital location.”<sup>20</sup> Approval of this four step process, according to DIRECTV, would “facilitate the delivery of local broadcast network channels to approximately 50 million homes nationwide.”<sup>21</sup>

Today, however, DIRECTV is requesting grant of its STA to move two satellites, prior to even *filing* its application for launch and operating authority of its DIRECTV 7S satellite. Moreover, DIRECTV has not disclosed whether the movement of its DIRECTV 1 and DIRECTV 6 satellites will occur prior to DIRECTV 7S’s final positioning at 119° WL. DIRECTV’s only justification for its radical departure from prior fleet management is to “enhance promptly” DIRECTV’s DBS service to Hawaii.

Numerous unanswered questions will need to be resolved by the Commission before it can determine as a factual matter whether a grant of DIRECTV’s STA would be in the public interest. Some of those questions are listed on Exhibit A hereto.

### Conclusion

For three years, DIRECTV staunchly maintained that it was somehow not technically feasible to serve Hawaii, while it ignored arguments that it was merely posturing as part of its litigation strategy against NRTC. But now that DIRECTV faces the threat of administrative sanctions, it has finally and unambiguously admitted that it has *chosen* not to fully serve Hawaii in an effort to advance its litigation position against NRTC.

DIRECTV states that it is “committed to the expansion of programming services offered to Hawaii residents.”<sup>22</sup> This statement runs counter to DIRECTV’s long and tortuous history of *denying* service to Hawaii and misleading the Commission about the real reason for it. Even at this late date, DIRECTV makes no mention in the STA of the litigation that actually prompts it.

It is critical for the Commission to understand the real reason behind DIRECTV’s STA. The STA is not, as DIRECTV claims, about “promptly” providing “enhanced” service to Hawaii.

DIRECTV’s STA is yet another step in its continuing attempt to further a private litigation position under the guise of the public interest. It is an abuse of the Commission’s processes for private gain. It is litigation posturing at the expense of NRTC, Hawaii and the Commission.

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<sup>20</sup> *Id.*, p. 4.

<sup>21</sup> *DIRECTV-1 1999 Modification*, pp. 5-6.

<sup>22</sup> STA, p.2.

Jennifer Gilsenan  
June 17, 2003  
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DIRECTV's latest gambit should be examined by the Commission not only in the context of the STA itself, but in connection with Hawaii's pending *Petition for Administrative Sanctions*.

Sincerely,



Jack Richards

Exhibit A: Unanswered Questions Regarding the STA

**Unanswered Questions**  
**Regarding the STA**

Other than claiming that its satellite re-shuffle will somehow promptly enhance service to Hawaii (a concern that did not weigh on DIRECTV for many years and will not be remedied by the STA), the STA is noticeably silent on details. For instance:

► DIRECTV states that it “currently uses its capacity at 110° WL to provide high-definition television (HDTV) programming channels to its DBS subscribers,”<sup>23</sup> and that “[o]nce DIRECTV 6 is positioned at 110° WL, the programming carried on DIRECTV 1 can be transferred to DIRECTV 6...”<sup>24</sup>

- Since DIRECTV currently is using its capacity at 110° WL to provide HDTV and the core programming services are being carried on DIRECTV 2 at 101° WL., how does the transfer of programming from DIRECTV 1 to DIRECTV 6 solve Hawaii’s need to receive a programming package comparable to that received throughout the continental United States?
- How long will it be before DIRECTV provides a full complement of programming services to Hawaii (including the so-called core programming services), comparable to what DIRECTV makes available to the continental United States?
- When will DIRECTV 6 be positioned at 110° WL?
- How long after DIRECTV 6 is positioned at 110° WL will programming be transferred from DIRECTV 1 to DIRECTV 6?
- What specific programming content -- not format -- will be transferred from DIRECTV 1 to DIRECTV 6?
- What processes are involved in transferring the programming from DIRECTV 1 to DIRECTV 6?

► Why did DIRECTV file its STA at this particular time?

What is the urgency in moving DIRECTV 1 so as to justify issuance of Special Temporary Authority?

- Is it only a coincidence that just two weeks ago, the court in the NRTC litigation rejected DIRECTV’s Motion for Summary Judgment that DIRECTV 1 at 110°

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<sup>23</sup> STA, p.2.

<sup>24</sup> *Id.*

WL was the satellite by which the term of the DBS Agreement should be measured?<sup>25</sup>

Is it only a coincidence that Hawaii's *Petition for Administrative Sanctions* remains pending?

- Since DIRECTV 1 is not intended to serve Hawaii from 101° WL and apparently will act as a backup at that location, how does the movement of DIRECTV 1 from 110° WL to 101° WL benefit in any way the citizens of Hawaii?

► Why is DIRECTV 6, which DIRECTV recently stated in a financing document has operational problems that make it “uninsurable,” being used as a primary source to provide HDTV from 110° WL?<sup>26</sup>

- What effect will the operational problems of DIRECTV 6 have upon DIRECTV's future provision of HDTV services?
- Why should DIRECTV be permitted to use a satellite with operational problems when consumers will be relying on it to purchase expensive HDTV equipment?
- Does the provision of HDTV to Hawaii with no provision of core programming justify the risky movement of two satellites that have suffered anomalies?

► DIRECTV states that after the programming is transferred from DIRECTV 1 to DIRECTV 6, “DIRECTV 1 will then be returned to the 101° WL to provide service and to act as additional backup capacity to DIRECTV's core national offerings at that location.”

- How soon after DIRECTV 6 is positioned at 110° WL will DIRECTV 1 be returned to 101° WL?
- When will DIRECTV 1 leave 110 WL°?
- When will DIRECTV 1 arrive at 101 WL°?
- As a technical matter, what risks are involved in moving DIRECTV 1 from 110° WL to 101° WL?
- Since DIRECTV 1 suffered a Signal Control Processor failure in 1999, which DIRECTV cited as justification to relocate it from 101 WL° to 110 WL°, <sup>27</sup> why is that same satellite being returned to 101 WL° to provide service and to act as a backup?
- Given that DIRECTV 3 currently is serving as an in-orbit spare providing backup at 101 WL°, why is it necessary for DIRECTV to relocate DIRECTV 1 to that location for additional backup?

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<sup>25</sup> Order Granting in Part and Denying in Part DIRECTV's Summary Judgment Motion No. 4, *National Rural Telecommunications Cooperative v. DIRECTV*, CV 99-5666 (C.D. Cal. May 22, 2003).

<sup>26</sup> DIRECTV Holdings LLC, DIRECTV Financing Co, Inc., Offering Memorandum, pp, 12, 52 and 55, February 25, 2003.

<sup>27</sup> Application for Authority to Launch and Operate Replacement Satellite DBS-1R, SAT-LOA-19990331-00035 (March 31, 1999).

- How much fuel will be consumed in moving DIRECTV 1 from 110° WL to 101° WL?
- When will DIRECTV 1 be capable of providing service from 101° WL?
- What services will be provided from DIRECTV 1 once it is returned to 101° WL?
- Which transponders on DIRECTV 1 will be used to provide services from 101° WL?
- Which transponders on DIRECTV 1 will be used as additional backup capacity at 101° WL?
- What disposition will be made of DIRECTV 2, DIRECTV 4S and DIRECTV 1-R at 101° WL?

► DIRECTV states that “[t]he primary purpose of the requested STA is to enhance promptly DIRECTV’s DBS service to Hawaii.”

- What other purposes are served by the requested STA?
- Why does DIRECTV not currently provide core programming services to Hawaii from DIRECTV 1R at 101° WL?
- Why is there no explanation as to how the movement of the impaired DIRECTV 6 to 110 WL° and the impaired DIRECTV 1 to 101 WL° will enable delivery of core programming to Hawaii (other than the delivery of HDTV )?

► DIRECTV states that it “may need to a minor modification of its satellite system authorization to accommodate the above-described changes...”.

- What minor modification may be necessary?
- If a minor modification is necessary, when does DIRECTV intend to request it? Why is the relocation of two existing satellites to completely new orbital slots not deemed to be major modifications of existing licenses requiring a full and complete application (not appropriately subject to an STA)?

\* \* \*

## **Certificate of Service**

I HEREBY CERTIFY that on this 17<sup>th</sup> day of June, 2003, a true and correct copy of the foregoing correspondence to Jennifer Gilsean, Satellite Policy Branch, Satellite Division of the International Bureau, was submitted via courier to the Federal Communications Commission, and served via courier, except as noted, upon the following:

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**DIRECTV's Request for STA  
And  
Hawaii's Petition for Sanctions.**

**JUNE 24, 2003**



# Background

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- **NRTC** is a non-profit cooperative comprised of more than 1,000 rural utilities and affiliates located in 48 states.
- **April 10, 1992.** NRTC enters into a DBS Distribution Agreement with DIRECTV's predecessor in interest.
  - NRTC's members and affiliates (including Pegasus) currently distribute DIRECTV programming to approximately 1.6 million rural consumers.

# NRTC vs. DIRECTV

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- **June 3, 1999.** NRTC files a lawsuit against DIRECTV in the United States District Court for the Central District of California.
- **In October of 1999.** DIRECTV 1R is launched into 101° WL.
  - Unlike DIRECTV's other satellites at 101° WL, DIRECTV 1R is capable of serving Hawaii.

# DIRECTV 1R and Hawaii



- For more than three years, DIRECTV has refused to use DIRECTV 1R to provide a full complement of core programming services to Hawaii, including:
    - A&E, Cartoon Network, Country Music Television, Discovery, Disney, Encore Basic, ESPN, Family Channel, Headline News, The Nashville Network, TNT, Turner Classic Movies, USA, The Weather Channel, WTBS
- and others on the list of 22 specific programming services provided to NRTC.

# DIRECTV's Excuses

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- **1999 – 2003.** DIRECTV tells the FCC that technical problems prevent it from providing these programming services to Hawaii. (On only one occasion three years ago did DIRECTV allude to “litigation issues” with NRTC.)
- **February 6, 2003.** Hawaii files a *Petition for Administrative Sanctions* against DIRECTV.
- **April 24, 2003.** After three years, DIRECTV concedes that it has not been serving Hawaii with these programming services because it may harm DIRECTV's litigation position against NRTC.

# The Real Reason DIRECTV Has Not Served Hawaii

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According to DIRECTV:

- “If DIRECTV moves any of [the 22 programming services provided to NRTC] to the newer generation satellite DIRECTV 1R, as suggested in the Hawaii Petition, DIRECTV exposes itself to unwarranted claims that it has changed the satellite that measures the NRTC contract term from an older generation satellite to DIRECTV 1R. Such a claim, if successful, would have a severe economic impact on DIRECTV by extending the NRTC contract term beyond the expected end of fuel life of DIRECTV 1...”

*Opposition to Hawaii Petition for Sanctions*, MB Docket No. 03-82, pp. 13-14 (April 24, 2003), *emph. added*.

# NRTC vs. DIRECTV

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- **May 22, 2003.** The court in the NRTC litigation rejects DIRECTV's Motion for Summary Judgment that DIRECTV 1 at 110° WL is the satellite by which the term of the DBS Agreement should be measured.
- **June 11, 2003.** DIRECTV files its STA to move DIRECTV 1 from 110° WL to 101° WL and DIRECTV-6 from 119° WL to 101° WL.

# The Reason For The STA

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## Myth

- DIRECTV claims that “the primary purpose of the requested STA is to enhance promptly DIRECTV’s DBS service to Hawaii.” (STA, p.1).

## Reality

- DIRECTV 1R has been capable of providing a full complement of programming to Hawaii since 1999.
- The STA is the latest in a three year effort by DIRECTV to advance its litigation agenda against NRTC by manipulating its satellites and service offerings to Hawaii.

# CONCLUSION

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- For more than three years, DIRECTV has short-changed Hawaii and misrepresented its intentions to the FCC, in an attempt to advance its private litigation position against NRTC.



**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petitions Regarding DIRECTV's DBS	)	MB Docket No. 03-82
Service to the States of Alaska and Hawaii	)	IB Docket No. 98-21

**OPPOSITION OF DIRECTV, INC.**

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Dated: April 24, 2003

Hawaii. Hawaii has proffered no evidence to contradict DIRECTV's track record of steadily improving service to the islands, or any basis to doubt that DIRECTV will pursue such proposals. Indeed, the Commission has reiterated recently its desire to "avoid dictating system design or business plans" to DBS providers,<sup>24</sup> and there is absolutely no ground to do so here with respect to Hawaii service.

Nor is it in the public interest to have Hawaii micromanage DBS programming decisions when Hawaii is neither familiar with nor subject to any of the significant technical or economic risks confronted by DIRECTV. For example, the Hawaii Petition states that DIRECTV could "include all of the ten most popular cable programming channels . . . [by moving this programming] from its older satellites at 101° W.L. to its new satellites at the same location."<sup>25</sup> DIRECTV does not dispute that it has the technical capability of moving certain programming channels from DIRECTV 2 to DIRECTV 1R, but, unfortunately, this partial solution to enhancing Hawaii service is not economically feasible at this time. The programming on the DIRECTV 1R satellite is currently the subject of imminent litigation with the National Rural Telecommunications Cooperative ("NRTC"). When the NRTC litigation is resolved, DIRECTV will have the ability to consider this option, and indeed, if the litigation is resolved in DIRECTV's favor, DIRECTV *hereby commits to pursue adjusting its lineup so as to make even more programming available to Hawaiian subscribers.*

Specifically, NRTC distributes certain DIRECTV DBS services through its members and affiliates in designated geographic areas. Under the terms of the NRTC contract, these

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<sup>24</sup> *DBS Rules Order* at ¶ 65.

<sup>25</sup> Hawaii Petition at 12.

distribution rights are tied to the fuel life of the DIRECTV 1 satellite,<sup>26</sup> but DIRECTV 1 suffered a failure of its primary spacecraft control processor on July 4, 1998. DIRECTV has since relocated this satellite to operate at the 110° W.L. orbital location, so that the delivery of a significant portion of programming viewed by the largest number of subscribers would not be on a satellite operating only on its back-up control processor. NRTC apparently viewed the reassignment of DIRECTV 1 as an opportunity to extend the term of its distribution rights. NRTC has since disavowed the contractual link to DIRECTV 1 and instead has offered shifting and inconsistent positions in its litigation with DIRECTV regarding which "satellite" it contends should now measure the term of its contract.

One of the many positions NRTC has taken in the litigation is that whichever satellite transmits twenty-two defined "Programming Services" is the satellite by which the NRTC contract term is measured.<sup>27</sup> Currently, the Programming Services are transmitted on DIRECTV 2, a satellite of the same generation as DIRECTV 1, launched in 1994 with an estimated fuel life that is within approximately two years of the range of the estimated fuel life for DIRECTV 1. If DIRECTV moves any of these twenty-two services to the newer generation satellite DIRECTV 1R, as suggested in the Hawaii Petition, DIRECTV exposes itself to unwarranted claims that it has changed the satellite that measures the NRTC contract term from an older generation satellite to DIRECTV 1R. Such a claim, if successful, would have a severe economic impact on DIRECTV by extending the NRTC contract term beyond the expected end of fuel life of

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<sup>26</sup> DIRECTV 1 is the initial satellite on which DIRECTV's DBS service (and the NRTC contract) commenced.

<sup>27</sup> These services are: A&E, Cartoon Network, CNBC, CNN, Country Music Television, Discovery, Disney, Encore Basic, ESPN, Family Channel, Headline News, The Nashville Network, TNT, Turner Classic Movies, USA, Weather Channel, WTBS, PBS Affiliate, ABC Affiliate, CBS Affiliate, Fox Affiliate and NBC Affiliate.

DIRECTV 1 in approximately 2009 to the end of fuel life of DIRECTV 1R, which may continue through 2024.

In light of this litigation, moving any of the twenty-two “Programming Services” onto DIRECTV 1R at this time would create risk for DIRECTV in the current NRTC litigation, which could in turn subject DIRECTV to substantial economic exposure. Any action DIRECTV takes with respect to the twenty-two Programming Services would necessarily expose DIRECTV to new threats and accusations by NRTC and would alter the facts now subject to dispute in the litigation. Beyond the economic risk associated with moving the Programming Services to DIRECTV 1R prior to resolution of the NRTC litigation, the very act of doing so would likely delay resolution of the dispute, extending the costs and uncertainty associated with prolonged participation in the litigation.

The NRTC litigation is set for trial on June 3, 2003, and its conclusion should result in a declaratory judgment regarding which satellite measures the term of the NRTC contract. When there is a final resolution, DIRECTV will have more flexibility regarding the placement of programming on its various satellites without the constraints (and economic exposure) of litigation.

Therefore, Hawaii is incorrect when it claims that DIRECTV’s claims of formidable technical and economic challenges are “completely unfounded.”<sup>28</sup> These technical and economic challenges exist, but DIRECTV is working diligently to overcome them. Indeed, subject to the outcome of the NRTC litigation, Hawaiian subscribers *could in the near term acquire up to*

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<sup>28</sup> Hawaii Petition at 12.

*twenty-two additional programming services in their service packages*<sup>29</sup> – and DIRECTV will make every effort to prevail in the NRTC litigation and to provide for this result. In the longer term, there is no question that service to Hawaiian subscribers will improve as DIRECTV replaces its CONUS satellites, and/or acquires additional capacity that can be used for Hawaii service. Hawaii thus should be applauding – rather than disparaging – DIRECTV’s efforts on this score.

**IV. LONG-STANDING COMMISSION PRECEDENT DEMONSTRATES THAT DIRECTV IS IN COMPLIANCE WITH THE COMMISSION’S GEOGRAPHIC SERVICE RULES**

**A. The Commission Has Consistently Found Nearly Identical Claims by Hawaii to Be Without Merit**

Despite DIRECTV’s efforts to provide quality DBS service to Hawaii residents, Hawaii has voiced at every opportunity its dissatisfaction that DIRECTV’s service to Hawaii is not *identical* to the service DIRECTV offers to the mainland. Each time Hawaii has brought its allegations to the Commission, however, the Commission has held in DIRECTV’s favor.

The Commission first dealt with Hawaii’s allegations in a November 2000 order granting DIRECTV authority to launch and operate DIRECTV 5.<sup>30</sup> In the *DIRECTV 5 Order*, in response to Hawaii’s allegations, the Commission found that DIRECTV had made great strides in bringing service to Hawaii, stating, “[W]e note that DIRECTV has initiated service to Hawaii. Although Hawaiian subscribers will not be offered the same programming package as CONUS

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<sup>29</sup> DIRECTV notes that these twenty-two additional services include much of the programming that Hawaii complains is currently lacking in DIRECTV’s Hawaii service packages. See Hawaii Petition at 6-7.

<sup>30</sup> *DIRECTV Enterprises, Inc. (For Authority to Launch and Operate a Direct Broadcast Satellite Service Space Station)*, 15 FCC Rcd 23630 (2000) (“*DIRECTV 5 Order*”).

## Certificate of Service

I HEREBY CERTIFY that on this 25<sup>th</sup> day of June, 2003, a true and correct copy of the foregoing ex parte presentation of the National Rural Telecommunications Cooperative, was submitted via courier and electronic filing to the Federal Communications Commission, and served via electronic mail upon the following:

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